SHER TREMONTE LLP

June 17, 2016

VIA ECF

The Honorable P. Kevin Castel
United States District Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *United States v. Galanis, et al.*, 15 Cr. 643(PKC)

Dear Judge Castel:

We write on behalf of our client, Gary Hirst, in response to the government's Request to Charge and Proposed Examination of Prospective Jurors, both filed on June 3, 2016. Mr. Hirst has the following objections to the government's proposals and respectfully requests the following additions, deletions, or alternate formulations:[1]

Request to Charge

Government's Request No. 6:

Mr. Hirst respectfully requests that Request to Charge No. 6 include all *four* elements of conspiracy; in other words, replace the fourth paragraph in the government's request, which begins "Third, that any one . . .," with the following:

> Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and
>
> Fourth, that the overt act(s) which you find to have been committed was (were) committed to further some objective of the conspiracy.
>
> > Adapted from Sand, *Modern Federal Jury Instructions*, Instr. 19-3.

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[1] Except where an entirely new formulation is proposed, additions to the government's requested charges are indicated in ***bold italics*** and deletions are indicated with ~~**bold strikethrough**~~.

Consistent with charging the jury with all four elements of conspiracy, Mr. Hirst respectfully requests that the Court charge the jury on Commission of Overt Act in Furtherance of the Conspiracy, and proposes that the Court use the following language, adapted from Sand's Instruction 19-8:

> The fourth, and final, element which the government must prove beyond a reasonable doubt is that the overt act was committed for the purpose of carrying out the unlawful agreement.
>
> In order for the government to satisfy this element, it must prove, beyond a reasonable doubt, that at least one overt act was knowingly and willfully done, by at least one coconspirator, in furtherance of some object or purpose of the conspiracy, as charged in the indictment. In this regard, you should bear in mind that the overt act, standing alone, may be an innocent, lawful act. The overt act does not have to be an act which, in and of itself, is criminal or constitutes an objective of the conspiracy.

Mr. Hirst also objects to the placement of the discussion of "Liability for Acts and Declarations of Co-Conspirators" before the jury has heard the full instruction on all the elements of conspiracy. Mr. Hirst proposes that this instruction be given after the foregoing charge on the fourth and final element of conspiracy.

Government's Request No. 8:

In the second sentence of the third paragraph of the government's requested charge, Mr. Hirst requests the following deletion:

> A device, scheme or artifice ~~**to defraud**~~ is merely a plan for the accomplishment of any objective.

Mr. Hirst also proposes replacing the last sentence of the third paragraph with the following:

> A scheme to defraud is any plan, device or course of action, and may involve false or fraudulent pretenses, untrue statements of material facts, omission of material facts, representations, promises and patterns of conduct calculated to deceive.
>
> > Adapted from Sand, *Modern Federal Jury Instructions*, Instr. 57-15.

Government's Request No. 9:

On page 15 of the government's request to charge, in the second full paragraph, which begins, "I want to caution you . . .," Mr. Hirst proposes the following additions:

> I want to caution you, however, that the defendant's mere presence at the scene of the alleged crime does not, by itself, make him a member of the conspiracy. Similarly, a person may know, assemble with, be friendly with, ***or do business with*** one or more members of a conspiracy, without being a conspirator himself. ***Mere similarity of conduct or the fact that two people may have assembled to together and discussed common aims and interests does not necessarily establish membership in a conspiracy.*** I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. ***Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes of the objectives of the conspiracy, does not make the defendant a member. More is required under the law.*** What is necessary is that a defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.
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> > Adapted from Sand, *Modern Federal Jury Instructions*, Instr. 19-6.

Government's Request No. 15:

Mr. Hirst objects to the portion of the last paragraph of the government's requested charge, insofar as it references a conscious avoidance charge. As discussed below, such a charge is inappropriate unless a sufficient factual predicate is established at trial. *See United States v. Kozeny*, 667 F.3d 122, 132 (2d Cir. 2011) ("The jury may be instructed on conscious avoidance *only where* (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." (emphasis added) (internal quotation marks omitted)).

Government's Request No. 24:

In the third paragraph of the government's requested charge, Mr. Hirst proposes the following change:

> Thus, a "scheme to defraud" is any plan, device, or course of action to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises. It is a plan to deprive another money or property by trick, deception, ***or*** swindle~~, **or overreaching**~~.
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> *See* Sand, *Modern Federal Jury Instructions*, Instr. 44-4.

Government's Request No. 25:

On page 46 of the government's requested charge, in the first full paragraph, Mr. Hirst respectfully requests the following insertion:

> Also, as I instructed you in regard to Count Two, I remind you that "good faith," as I previously defined that term, is a complete defense to a charge of wire fraud. ***However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate those statements turn out to be.*** A defendant has no burden to establish good faith. . . .
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> Adapted from Sand, *Modern Federal Jury Instructions*, Instr. 44-5.

Government's Request No. 40:

Mr. Hirst objects to this proposed charge. A conscious avoidance charge should only be given if (1) a defendant assert the lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate for the charge exists. *See Kozeny*, 667 F.3d at 132. Thus, a defendant must contest knowledge at trial and the government must meet its burden of producing sufficient evidence that a rational juror could conclude beyond a reasonable doubt that the defendant was "aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *Id.* (internal quotation marks omitted). The Second Circuit has held that it is not sufficient for the government to establish that "the factual context *should have apprised* the defendant of the unlawful nature of his conduct," but rather must prove that the defendant "*decided* not to learn the key fact." *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000) (internal quotation marks and alterations omitted). At a minimum, the Court must therefore defer decision on the government's proposed instructions until the close of the evidence and determine at that point whether the government has met its burden and is entitled to the requested instruction.

Government's Request No. 44:

Mr. Hirst objects to the proposed charge, especially the second and third paragraphs, which attempt to present to the jury inferences that the government *may argue* as facts presented with the authority of the Court. *See* Sand, *Modern Federal Jury Instructions*, Instr. 7-5 ("*The government argues*, as it is permitted to do, that it must take the witnesses as it finds them." (emphasis added)). The government's proposed instructions also improperly attempt to have the Court vouch for and bolster the credibility of cooperating witnesses by suggesting that such witnesses are necessary for prosecuting crime in general. This is inappropriate for a jury charge and is instead properly argued in the government's summation. In lieu of the government's proposed charge, Mr. Hirst respectfully requests that the Court give the following instruction:

> You have heard from witnesses who testified that they committed crimes. These witnesses testified pursuant to cooperation agreements with the government. Let me say a few things that you want to consider during your deliberations on the subject of the testimony of cooperating witnesses.
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> The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others. For those very reasons, the law allows the use of accomplice testimony. It is the law in federal courts that the testimony of accomplices may be enough in itself for conviction; however, you should not convict a defendant on the unsupported testimony of an accomplice, unless you believe beyond a reasonable doubt that the accomplice is telling the truth.
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> Testimony from cooperating witnesses is of such a nature that it must be scrutinized with great care and viewed with particular caution when you decide how much, if any, of the testimony to believe. The fact that a witness is testifying pursuant to an agreement with the government may be considered by you as bearing on his credibility.
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> The testimony of cooperating witnesses should be given only such weight as it deserves in light of all the facts and circumstances before you, taking into account the witness's agreement to cooperate with the government, his candor, the strength and accuracy of his recollection, his background, his demeanor, and the extent to which his testimony is or is not corroborated by other evidence in the case. As with other witnesses, you may consider whether the cooperating witnesses have an interest in the outcome of the case, and, if so, whether that interest has affected their testimony. In this regard, you should bear in mind that a witness who has entered into a cooperation agreement with the government has an interest and motives

different from those of other witnesses. In evaluating the testimony of cooperating witnesses, you should ask yourselves whether the witness would benefit more by lying, or by telling the truth. Was his or her testimony made up in any way because he or she believed or hoped that he or she would somehow receive favorable treatment by testifying falsely? Or did he or she believe that his or her interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of avoiding severe criminal penalties, was the motivation one that would cause him or her to lie, or was it one that would cause him or her to tell the truth? Did this motivation color his or her testimony?

If you find that the testimony was false, you should reject it. However, if, after a cautious and careful examination of the cooperating witness's testimony and demeanor upon the witness stand, you are satisfied beyond a reasonable doubt that the witness told the truth, you should accept it as credible and act upon it accordingly.

As with any witness, let me emphasize that the issue of credibility need not be decided in an all-or-nothing fashion. Even if you find that a witness testified falsely in one part, you still may accept his or her testimony in other parts, or may disregard all of it. That is a determination entirely for you, the jury.

[***If applicable***:] You have also heard testimony that these witnesses pled guilty to charges arising out of some of the same facts that are at issue in this case. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of any defendant on trial from the fact that a government witness pled guilty to similar charges. The decisions of those witnesses to plead guilty were personal decisions that the witnesses made about their own guilt. The decision of witnesses who participated in the crime to cooperate with the government is not evidence that the defendants committed a crime. A defendant may not be found guilty simply based on his association with individuals who decided to plead guilty or cooperate with the government.

> Adapted from Sand, *Modern Federal Jury Instructions*, Instr. 7-5; *see also United States v. Prawl*, 168 F.3d 622, 628 & n.3 (2d Cir. 1999) (discussing formulations of the instruction and explaining that special credibility problems of cooperating witnesses must be given when requested); *United States* v. *Ramirez*, 973 F.2d 102, 104-06 (2d Cir. 1992) (specifically approving charge and holding that it is reversible error not to give charge if requested, unless there is no significant prejudice to defendant).

Additional Charges

Mr. Hirst respectfully request s that the Court give the following charge regarding multiple conspiracies:

> In this case, the government has charged several separate and independent conspiracies with various groups of members. Proof of several separate and independent conspiracies is not proof of a single, overall conspiracy. Instead, as I have instructed you, you must evaluate each defendant charged in the conspiracy charged in each count of the indictment, and determine whether the government has proved beyond a reasonable doubt that that particular defendant was a member of that particular conspiracy, and knowingly and willfully agreed to further its unlawful objective.
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> Adapted from Sand, *Modern Federal Jury Instructions*, Instr. 19-5.

Proposed Examination of Jurors

Mr. Hirst respectfully requests that, in addition to the questions requested by the government, the Court include the following questions in its examination of prospective jurors pursuant to Rule 24(a) of the Federal Rules of Criminal Procedure:

1. Does anyone feel that, because these defendants are sitting here in court, they must have done something wrong? Why or why not?

2. Do you understand that all of the defendants are presumed innocent? In other words, as you sit here right now, you must presume that they are innocent. So if you were asked to render a verdict at this point, it would have to be *not* guilty. Does that trouble you for any reason? Why or why not?

3. Will it concern you if any of the defendants do not testify on their own behalf? Would you expect to hear from the defendants if they were not guilty? Can you think of reasons why someone might not want to testify, even if he or she were not guilty?

4. In a criminal case, the burden of proof never shifts from the government to the defense. I will give you more explanation about this at the end of the trial, but for now, it suffices to say that the defense does not have to present any evidence at all, and if the government does not prove its case as to any defendant beyond a

reasonable doubt, you must find that defendant not guilty. Does that trouble you for any reason? Do you think that a defendant should have to prove that he is not guilty? Why or why not?

Respectfully submitted,

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